Supreme Court, U. S.
FILED
JAN 12 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-737

THE GOODYEAR TIRE & RUBBER COMPANY,

Petitioner,

v.

BIG O TIRE DEALERS, INC.,

Respondent.

SUGGESTION OF MOOTNESS

Petitioner The Goodyear Tire & Rubber Company ("Goodyear") and respondent Big O Tire Dealers, Inc. ("Big O") respectfully suggest to the Court that, as a result of their having entered into a settlement agreement, this cause has now become moot.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was filed by Goodyear on November 23, 1977, seeking review of a decision by

the Court of Appeals which affirmed, as modified, a decision of the United States District Court for the District of Colorado. After the Petition was filed, Goodyear and Big O entered into settlement negotiations, and on January 11, 1978 reached an agreement settling all claims between them at issue in this case and certain other disputes between them which are not at issue here. Under these circumstances, it appears to the parties that the cause has become moot.

Accordingly, simultaneously with the filing of this Suggestion of Mootness, Goodyear will move for an order vacating the judgment below and remanding for the dismissal of this case with prejudice. Big O has no objection to the granting of that relief, although Big O does not join in or stipulate to that procedure.

Respectfully submitted,

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PETITIONER'S MOTION FOR AN ORDER VACATING THE JUDGMENT BELOW

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THE GOODYEAR TIRE & RUBBER COMPANY,

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BIG O TIRE DEALERS, INC.,

Respondent.

PETITIONER'S MOTION FOR AN ORDER VACATING THE JUDGMENT BELOW

A Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was filed by petitioner The Goodyear Tire & Rubber Company ("Goodyear") on November 23, 1977, seeking review of a decision by the Court of Appeals which affirmed, as modified, a decision of the United States District Court for the District of Colorado. By a filing made contemporaneously with this motion, Goodyear and respondent Big O Tire Dealers, Inc. ("Big O") have respectfully suggested to the Court that the cause has now become moot.

After the petition was filed, Goodyear and Big O entered into settlement negotiations. On January 11, 1978, they reached an agreement settling all claims in this case and certain other disputes between them which are not at issue here. The settlement contemplated that Goodyear would

submit this motion requesting the Court to vacate the judgment below and to remand with instructions to dismiss so that the prior proceedings would not have any collateral estoppel effect. Big O has authorized Goodyear to inform the Court that (although it is not joining in or stipulating to this motion) Big O has no objection to the Court's granting the relief prayed for.

Goodyear therefore respectfully moves this Court to grant Goodyear's Petition for a Writ of Certiorari, to vacate the judgment below and to remand this case with instructions to the District Court to dismiss the action with prejudice.

As presented in greater detail in Goodyear's petition and reply brief, had this case not been settled, it would have been appropriate for this Court to grant certiorari to review several holdings on important questions of law by the courts below. Goodyear argued in its petition that:

— The District Court and the Court of Appeals incorrectly held that a controversy must have "crystalized to the point of threatened litigation" before settlement efforts are protected by the provision of Fed.R.Evid. 408 which excludes "statements made in compromise negotiations". If allowed to stand, this holding would curtail or eliminate the beneficial effect intended by the draftsmen of Rule 408 (to encourage settlement efforts) and would inhibit compromise negotiations in the future (Petition 14-18; Reply Brief 2-5).

— The Court of Appeals incorrectly held that a general verdict based on alternative theories may stand even though there was fundamental error in the charge on one theory and the other theory should never have gone to the jury. This ruling

ignored a contrary Supreme Court decision and would permit future plaintiffs to recover substantial damages without proving a single valid cause of action (Petition 18-21; Reply Brief 5-6).

— The District Court and the Court of Appeals held that an owner of a valid federally registered trademark may not extend his mark to other uses without (a) assuming the burden of proving its validity and continuous use, and (b) also proving a prior "purpose or propensity" to expand its use. These holdings would write the doctrine of trademark extension out of the law (Petition 21-24; Reply Brief 6-7).

— The District Court and the Court of Appeals permitted recovery of substantial compensatory damages based solely on the *defendant's* advertising expenditures, a holding which (if allowed to stand) would permit future plaintiffs also to recover large damages in the absence of any evidence of pecuniary losses (Petition 24-28; Reply Brief 7-8).

— The decisions below permitted, and could be cited as authority to permit, recovery of massive punitive damages based on conduct which had never previously been held to constitute an actionable wrong (Petition 28; Reply Brief 8-9).

— Finally, the decisions below permitted the plaintiff to recover damages on a novel cause of action which never existed before and which was not defined by the judge until after the trial. They thus contravened the due process principle that a defendant must be given sufficient notice to provide an opportunity to defend itself (Petition 29-30; Reply Brief 9).

In view of these fundamental errors, it would be particularly unfair to Goodyear and detrimental to the true administration of justice if the judgment below were to be given any res judicata or collateral estoppel effect. Although Goodyear and Big O have agreed that the judgment below shall have no res judicata or collateral estoppel effect, it seems appropriate in these circumstances to clarify the status of the prior proceedings, particularly insofar as third parties are concerned, by an order vacating the judgment.

This Court has previously recognized the importance of orders providing for the vacatur or dismissal of a lower court judgment in similar circumstances. In *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), the Court outlined the procedure to be followed when a case becomes moot and a motion to vacate the judgment is made:

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." (340 U.S. at 39.)
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> "As already indicated, it [*i.e., vacatur*] is commonly utilized in precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." (340 U.S. at 41.)

By following this procedure in cases which have become moot as a result of settlement, this Court fosters the settlement process. Otherwise, parties may be wary of settlement once a lower court judgment has been obtained because that judgment, if left standing, may be accorded res judicata or collateral estoppel effect in the future.

In *Hammond Clock Co.* v. *Schiff*, 293 U.S. 529 (1934), the parties agreed to settle their dispute after a decision had been reached by a District Court and affirmed by the Seventh Circuit Court of Appeals. In a *per curiam* decision, the Supreme Court stated:

> "On consideration of a suggestion by petitioner that the cause herein has become moot by reason of settlement between the parties, and of a motion by petitioner to reverse the decree of the Circuit Court of Appeals and to remand the cause with directions to dismiss, and respondent having consented to the entry of an order pursuant to the motion, it is ordered that the said motion be, and it is hereby, granted, and the decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with directions to vacate its decree and to dismiss the bill of complaint as against the respondent without prejudice, and without costs to either party, upon the ground that the cause is moot." (293 U.S. at 530.)

Another illustration of this procedure is *J. Aron & Co.* v. *Mississippi Shipping Co.*, 361 U.S. 115 (1959). In that case, the entry of an interlocutory decree by a District Court was reversed by the Fifth Circuit Court of Appeals. After the petition for certiorari had been filed, the parties agreed to the entry of a consent judgment by the District Court. The Supreme Court vacated the lower federal court judgments relating to the interlocutory decree, stating:

> "It appearing from the petitioner's suggestion of mootness that, subsequent to the judgment of reversal by the Court of Appeals of the original interlocutory decree of the District Court and the filing of the petition for writ of certiorari, a consent judgment for damages and costs was entered by the District Court,

the petition for writ of certiorari is granted, the judgment of the Court of Appeals is vacated and the case is remanded to the Court of Appeals with directions to dismiss the appeal as moot." (361 U.S. at 115.)

Petitioner therefore respectfully asks this Honorable Court to vacate the judgment below on the basis of mootness and the consequent inability of this Court to review it and to remand with instructions that this case be dismissed with prejudice.

Dated: January 12, 1978.

Respectfully submitted,

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